IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-715

A. ERNEST FITZGERALD,
Petitioner

vs.

ELMER B. STAATS, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Petitioner A. Ernest Fitzgerald respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered June 2, 1978.

OPINIONS BELOW

The opinion of the District Court is reported at 429 F. Supp. 933, and appears in the Appendix at pp. 24-a—29-a. The opinion of the Court of Appeals is reported at 578 F.2d 435, and appears in the Appendix at pp. 1-a—23-a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1978. Within ninety days of that date, on August 9, 1978, the time in which to file a petition for certiorari was extended by order of Mr. Justice Brennan until October 30, 1978. Jurisdiction is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

Under the Back Pay Act, 5 U.S.C. § 5596, a government employee who was unlawfully fired has a right to be made whole for his losses. The employee cannot be made whole unless he receives interest on back pay which was withheld from him. Despite the statutory policy that the employee be made whole, the court below ruled that, pursuant to decisions of this Court, the doctrine of sovereign immunity precludes an award of interest on back pay recovered by an illegally terminated employee. In these circumstances, the question presented is whether this Court should permit awards of interest on back pay to be barred by the doctrine of sovereign immunity even though that doctrine is inconsistent with the statutory policy, is inconsistent with fundamental precepts underlying a constitutional republic operating under the rule of law, is incompatible with decisions of this Court curtailing governmental immunities and with decisions of the Court holding that judicial tribunals must fashion remedies to implement constitutional and statutory rights, and is particularly inapplicable to an award of interest on back pay because of principles regarding ancillary and traditional remedies.

STATUTES INVOLVED

The Back Pay Act, 5 U.S.C. § 5596, provides in pertinent part:

> (b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reductions of all or a part of the pay, allowances, or differentials of the employee—
>
> (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period . . . .

STATEMENT

INTRODUCTION

This petition for certiorari is filed by A. Ernest Fitzgerald, whose name has become synonymous with governmental retaliation visited upon those who lawfully expose serious inefficiency or wrongdoing in government programs. See *Branzburg* v. *Hayes*, 408 U.S. 665 at 724 n. 12 (dissenting opinion of Justice Douglas in the consolidated case of *United States* v. *Caldwell*); *Fitzgerald* v. *Hampton*, 467 F.2d 755 (CADC, 1972); *Fitzgerald* v. *United States Civil Service Commission*, 554 F.2d 1186, 1190, 1188 n. 2 (CADC, 1977); *Fitzgerald* v. *United States Civil Service Commission*, Civ. No. 74-686, decided July 15, 1974, D.C.D.C. Fitzgerald was illegally fired as one of the Air Force's chief cost analysts almost nine years ago, after accurately testifying before the Subcommittee on Economy in Government of the Joint Economic Committee (JEC) that the C-5A transport plane program could well incur approximately $2 billion in cost overruns. Though in 1973 a Civil Service hearing examiner ordered that he be reinstated with back pay to a job with the same or similar qualifications, he has never in fact been reinstated to a job requiring his expertise. Instead, of being given a job working on major weapons systems—the work he did before he was illegally fired—he has been placed in such positions as overseeing bowling alleys in Thailand.

In the present petition Fitzgerald seeks to overturn an order of the United States Court of Appeals for the District of Columbia upholding the government's refusal to pay him interest on back pay which was withheld from him. A large amount of the back pay on which interest is sought was lengthily withheld from Fitzgerald even after the government conceded that it was owed to him.

STATEMENT OF FACTS

I.

Ernest Fitzgerald is a specialist in cost controls. He began his career in private industry, where he worked on cost controls for vital defense projects such as the Minuteman missile program, and created a new cost control system now widely known in the military contracting industry. The excellence of his work brought him to the attention of high Air Force officials, who prevailed upon him in 1965 to join the Air Force Secretariat as Deputy for Management Systems. His work for the Air Force received an "Outstanding Performance Rating" from his superiors in 1966 and 1967.

In 1968 Congress became interested in the costs of developing the huge C-5A transport plane and the Joint Economic Committee (JEC) requested Fitzgerald's testimony on this subject. Fitzgerald testified to the JEC on November 13, 1968 that there could be a $2 billion cost overrun on the plane. The Secretary of Defense and Air Force generals, including the Chief of Staff, subsequently admitted that Fitzgerald's figures were accurate.

After Fitzgerald's testimony, he became ostracized within the Air Force, had his tenured status taken away, was subjected to public charges and secret investigations by Air Force officials, and was fired on November 4, 1969.

II.

On January 20, 1970, Fitzgerald instituted an appeal before the Civil Service Commission (CSC) for reinstatement, back pay and other relief, on the ground that his firing was improper and contrary to law. The CSC Appeals Examiner ruled that the hearings before him would be closed ones, but, in a lawsuit thereupon instituted on this question by Fitzgerald, the United States Court of Appeals for the District of Columbia ordered that the hearings be open. In rejecting the government's plea for secret hearings, the Court of Appeals, quoting Justice Douglas, warned of the dangers which can flow from government actions which do not meet standards of fair dealing. *Fitzgerald* v. *Hampton*, 467 F.2d 755, 767-768 (1972).

After open hearings thereafter took place, the Appeals Examiner ruled that Fitzgerald's firing had been due to improper reasons. The Examiner recommended that Fitzgerald be restored retroactively to the position from which he had been separated or to one having the same or similar qualifications. The Examiner further recommended an award of back pay and denied an award of attorneys fees.

III.

Fitzgerald appealed the denial of attorneys fees to the full Commission, which ruled against him on the ground that payment of attorneys fees was not authorized by the relevant statute, Section 14 of the Veterans Preference Act, 5 U.S.C. § 7701. Fitzgerald then instituted a lawsuit for the fees in the United States District Court for the District of Columbia, which held in his favor but was overruled by the Court of Appeals. Though the Court of Appeals agreed with the lower court that a denial of attorneys fees might work a miscarriage of justice in

this case,[1] it held that "attorneys fees are not awardable under § 14 because that section does not contain the requisite explicit waiver of sovereign immunity." *Fitzgerald* v. *United States Civil Serv. Com'n*, 554 F.2d 1186, 1188 (CADC, 1977).

IV.

The Air Force took no appeal to the full Commission from the Examiner's ruling that Fitzgerald had been fired for improper reasons. The Examiner's recommendation thus became the final order of the Commission on October 3, 1973, and Fitzgerald thereupon obtained a right to reinstatement to an appropriate position and, after appropriate deductions, to a considerable amount of back pay. However, the Air Force refused to reinstate Fitzgerald to an appropriate position and the CSC denied Fitzgerald relief on this issue. Fitzgerald therefore brought a lawsuit in the United States District Court for the District of Columbia asserting his right to reinstatement.[2] The district court vigorously upheld his right, but to this day the Air Force still has not reinstated Fitzgerald to an appropriate position.

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[1] The appellate court said that the district court might have been correct in fearing that a denial of attorneys fees " 'would make a mockery and a sham of the mandate of Congress, and in cases like the present one would make those rights meaningless.' " 554 F.2d at 1190.

The Court of Appeals also noted that Fitzgerald "has, on more than one occasion, been forced to seek judicial relief in order to insure the integrity of the administrative hearing process." 554 F.2d at 1188 n.2.

[2] In upholding Fitzgerald, the court said, per Judge Bryant:

> This case, however presents an exceptional history of unseemly delay and conduct by various agencies of government. This conduct smacks of harassment and vindictiveness towards an individual who dared expose the shortcomings of his superiors and, whether deliberately or not, it will intimidate others who might feel duty bound to take similar action. *Fitzgerald* v. *United States Civil Serv. Com'n.*, Civ. No. 74-686, decided July 15, 1974, at p. 5.

V.

Just as the Air Force failed to reinstate Fitzgerald to a proper position after the Appeals Examiner's decision, so too it refused to promptly pay him one dime of the total amount of money owed to him: it would not even promptly pay him portions which it *conceded* were owing to him. Instead, it delayed payment by asking the Comptroller General to rule that large amounts should be deducted from his back pay award, and, while the Comptroller's decision was pending, flatly refusing to pay Fitzgerald even the amounts conceded to be owing. After almost eight months of this conduct, the Comptroller General ordered the Air Force to pay Fitzgerald the conceded amounts, which then totalled $34,498.39. Thirteen months later, on June 19, 1975, the Comptroller General overruled the Air Force's erroneous claim for deductions from the back pay award. Thus 21 months after the Examiner's decision, Fitzgerald finally received the remaining money owed to him, which was $38,250.23.

VI.

Though the Comptroller General's decisions resulted in Fitzgerald finally receiving the amounts of back pay owed to him, the Comptroller General also ruled on May 6, 1974 that interest was not recoverable on the back pay. Fitzgerald thus received no interest on monies which had been wrongly withheld from him over a span of 5½ years—i.e. from the effective date of the wrongful firing which denied him a salary, January 6, 1970, to the date of final payment of back pay, June 19, 1975. He did not even receive interest on the amounts of back pay which had concededly been owing subsequent to the decision of the Appeals Examiner.

After the Comptroller General's decision denying interest, Fitzgerald brought a lawsuit in the United States District Court for the District of Columbia to recover interest on the monies which had been withheld. Fitz-

gerald claimed an entitlement to interest under the Back Pay Act, 5 U.S.C. § 5596; under the Veterans Preference Act, 5 U.S.C. § 7701; and under 31 U.S.C. § 227, which provides a method for dealing with final judgments against the United States when the government claims an offset on the ground that the judgment creditor is indebted to the United States.

The District Court held against Fitzgerald. *Fitzgerald* v. *Staats*, 429 F. Supp. 933 (D.C.D.C., 1977). Citing precedent from this Court, it ruled that, because the Back Pay Act does not expressly provide for the payment of interest, the Act does not contain an explicit waiver of sovereign immunity and therefore does not authorize the recovery of interest. It also held that 31 USC § 227 does not authorize interest in this case because Fitzgerald had obtained no judgment against the United States.

Fitzgerald then appealed to the United States Court of Appeals for the District of Columbia. The Court of Appeals, per Judges Lumbard (sitting by designation), McGowan and MacKinnon, was highly sympathetic to Fitzgerald's plight, pointing out that this was "his latest skirmish in his struggle" and that "[p]art of the history of Fitzgerald's battle" could be found in prior opinions. *Fitzgerald* v. *Staats*, 578 F.2d 435, 436 n.2 (C.A.D.C., 1978). The Court was also warmly disposed towards the merits of Fitzgerald's case, saying in this regard that he "undoubtedly deserves to be 'made whole' by the government, and that it had "sympathy for Fitzgerald's position." 578 F.2d at 440, 436. Indeed, the court even indicated clearly that its preference would have been to decide the case in Fitzgerald's favor: in assessing Fitzgerald's argument that the " 'make whole' " policy of the Back Pay Act and the "corrective action" policy of the Veterans Preference Act show the payability of what the court termed "so natural and common a remedy as interest," the court said "were we free to decide whether the policies of these remedial statutes called for the recovery

of interest, we might well agree with" Fitzgerald. 578 F.2d at 438.

However, the Court of Appeals believed it was not free to act in accordance with its view of the justice and merits of the case. "Despite our sympathy for Fitzgerald's position", it said, "we believe ourselves constrained to affirm." 578 F.2d at 436. And though it "might well agree with" Fitzgerald "[w]ere we free to" do so, the court believed "we are not so free." 578 F.2d at 438.

In explaining why it felt forced to reject Fitzgerald's argument that the Back Pay Act and Veterans Preference Act authorized the payment of interest, the Court of Appeals relied heavily on decisions of this Court holding that, unless it is expressly waived, the doctrine of sovereign immunity prevents suit against the United States. The Court of Appeals relied in particular on this Court's ruling in *United States* v. *Thayer-West Point Hotel*, 329 U.S. 585 (1947), that sovereign immunity bars the recovery of interest against the United States unless a statute provides for such recovery in express terms.

The Court of Appeals rejected Fitzgerald's argument under 31 U.S.C. § 227 on the ground that Fitzgerald was not a judgment creditor and was not indebted to the United States. 578 F.2d at 439.

The instant petition for certiorari seeks review of the Court of Appeals decision. More specifically, review is sought of the court's ruling that the doctrine of sovereign immunity bars the payment of interest under the Back Pay Act.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. THIS LAWSUIT RAISES ISSUES OF SUBSTANTIAL PUBLIC IMPORTANCE

The Back Pay Act states that a government employee who has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or re-

ductions of all or part of the pay, allowances or differentials of the employee—(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred. . . ." In providing that a wronged employee should receive what he otherwise would have earned, the Act evinces a clear congressional policy that an unlawfully terminated employee should be made whole for any losses he has suffered because of the wrongful termination.

In the courts below, Fitzgerald argued that this make whole policy of the Back Pay Act entitled him to receive interest on the back pay which had been withheld from him because he was wrongfully fired by the Air Force. This legal argument is premised on the simple proposition that, having lost the use of the monies over a span of years, Fitzgerald cannot truly receive what he otherwise would have earned and cannot be made whole unless he is compensated by interest. The proposition that interest is necessary to compensate for the lost use of monies and to make a party whole is universally accepted in the American economy. It is obviously followed by the United States Government itself, which demands that interest be paid to it by persons who have withheld monies from it, such as persons who have not paid the appropriate amount of taxes or have paid them late. The validity of Fitzgerald's argument, and its plain basis, was not denied by the district court, was not denied by the Court of Appeals—which called interest "so natural and common a remedy" —and was not even denied by the government. Rather, Fitzgerald lost his argument for one reason only: the doctrine of sovereign immunity. As previously indicated, both lower courts held that, pursuant to precedents of this Court, sovereign immunity blocks an award of interest against the United States unless a statute provides in express terms for the payment of interest.

The question which therefore arises is whether this Court should continue to permit the judicially-created doctrine of sovereign immunity to prevent an award of interest against the United States in cases where a statute does not provide in express terms for the payment of interest. It is Fitzgerald's contention that the answer to this question must necessarily be in the negative for three reasons which are of such fundamental importance to this nation that they inherently demonstrate that this case raises issues of enormous consequence for the law and the country.

The first reason is that, because it destroys the possibility of recovery by citizens who have been grievously and wrongfully injured by the government, sovereign immunity is wholly incompatible with the most basic concepts of a constitutional government operating under the rule of law. In view of its inconsistency with basic concepts underlying our structure of government, sovereign immunity should no longer be allowed to bar such recoveries.

Second, sovereign immunity is highly inconsistent with decisions of this Court curtailing governmental immunities and decisions of the Court holding that courts must fashion remedies to implement constitutional and statutory rights. For this reason, also, sovereign immunity should not be allowed to bar recoveries.

Third, even if the doctrine of sovereign immunity were not to be wholly disposed of by this Court, the doctrine is particularly inapplicable to the payment of interest on statutory awards of back pay which has been wrongfully withheld by government. This pronounced inapplicability exists due to principles established by this Court regarding ancillary and traditional remedies. Thus sovereign immunity should not bar the recovery of interest on back pay even if the doctrine were to continue to bar recoveries in other contexts.

II. SOVEREIGN IMMUNITY IS INCOMPATIBLE WITH CONSTITUTIONAL GOVERNMENT EXISTING UNDER THE RULE OF LAW

A. The Decision of This Court in United States v. Lee

Almost 100 years ago, in its "classic opinion"[3] in *United States* v. *Lee*, 106 U.S. 196 (1882), this Court recognized that the doctrine of sovereign immunity is wholly inconsistent with fundamental concepts of American government. Sovereign immunity, said the Court, was derived from England, where it had existed at least from the time of King Edward I. 106 U.S. at 205. Although it had been asserted in America, it "has never been discussed or the reasons for it given." 106 U.S. at 207. In analyzing the reasons for it, the Court pointed out that the grounds which justified the doctrine in England were entirely inapplicable to the United States because of the "vast difference in the essential character of the two governments as regards the source and the depositories of power." 106 U.S. at 208. England, said the Court, is a "king-loving nation", where "[t]he crown remains the fountain of honor," and "the monarch is looked upon with too much reverence to be subjected to the demands of law, as ordinary persons are." But the United States (which fought a revolution against rule by a king) is entirely different:

> Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. 106 U.S. at 208.

[3] *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 165 at 178. (Dissent of Rehnquist, J., discussing the opinion of Justice Miller in the *Slaughter House Cases.*)

In England, where the courts are the king's courts, a suit against the government would involve "the absurdity of the king's sending a writ to himself to command the king to appear in the king's court." But, said the Court, "[N]o such reason exists in our government." 106 U.S. at 206. "Nor can it be said the government is degraded by appearing as a defendant." *Id.* And if it be argued that suit against the government "would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign," *id.*, the clear answer is that "[a]s no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests." 106 U.S. at 206.

Just as the Court believed the differences between England and the United States militated heavily against the doctrine of sovereign immunity, so too the Court believed that sovereign immunity cannot be justified by any argument that evils will befall the nation if the government is subject to suit. The history of the country was against any such argument. Though the United States government had existed "for now nearly a century under the present constitution," with the "principle and practice" of judicial action against unlawful conduct by the United States government being "well established," "no injury from it has come to that government." 106 U.S. at 221. Indeed, no harm from the judicial check against unlawful conduct had befallen the government even though the principle and practice of a such a check had existed over

a lengthy period during which the nation had been involved in "at least two wars, so serious as to call into exercise all the powers and all the resources of the government . . . One of them was a great civil war, such as the world has seldom known . . . ." *Ibid.* at 221-222.

Even aside from the history of the nation, the Court was unwilling to countenance any argument positing that calamities would arise if sovereign immunity were struck down. For such arguments would destroy the system of law.

> Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

To the Court in *Lee*, the evils to be feared were not those imagined from an absence of sovereign immunity, but the destruction of rights which accompanies sovereign immunity.

> Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name . . . 106 U.S. at 219.
>
> These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution . . . . 106 U.S. at 220.
>
> Courts of justice are established, not only to decide upon the controverted rights of the citizens against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.
>
> Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?
>
> If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights. 106 U.S. at 220-221.

B. This Court Should Return To the Teachings of Lee

The opinion in *Lee* was clearly correct, but in subsequent years, its teachings largely fell into desuetude. Sovereign immunity was repeatedly invoked by the government and upheld by this Court. E.g. *United States* v. *Sherwood*, 312 U.S. 584 (1941); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947); *United States* v. *Alcea Band of Tillamooks, et al.*, 341 U.S. 48 (1951); *United States* v. *King*, 395 U.S. 1 (1969); *United States* v. *Testan*, 424 U.S. 392 (1975). Rarely were any reasons given for upholding it: rather, it usually was sustained as an ipsi dixit. It became, to borrow a memorable phrase used by Justice Warren, a "talismanic

incantation [used] to support any exercise of . . . power which can be brought within its ambit." [4] *United States* v. *Robel*, 389 US 258, 263 (1967).

Only on relatively infrequent occasions did the Court depart from the doctrine. The Court did once acknowledge that there could be substance in the argument that sovereign immunity is an archaic hangover which should be limited wherever possible in connection with suits for damages, that Congress itself had increasingly permitted damage suits, and that the Court should be hospitable to this trend. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703-704 (1949). And Justice Frankfurter did point out on various occasions that justice and democratic notions of moral responsibility require that the sovereign not be free of ordinary legal responsibility. *E.g. Larson* v. *Domestic and Foreign Commerce Corp.*, *ibid.*, at 708-709, 723-724, 723 n.13 (dissenting opinion of Justice Frankfurter). But for the most part, though sovereign immunity is a judge-made doctrine which could be curbed by judges, the Court left it entirely to the Congress to make inroads upon the doctrine. Perhaps the only broad inroad made by this Court itself was its holding in *Dugan* v. *Rank*, 372 US 609 (1963), that sovereign immunity will not apply when an official's action is in excess of his statutory powers or, though within his statutory powers, the powers themselves, or the manner of their exercise, are constitutionally void. However, while this inroad has the estimable virtue of at least removing the bar of sovereign immunity where an official has no power or the Constitution is violated, it does not touch the host of cases in which government wrongly injures citizens by actions which are within statutory powers and not constitutionally void. The present litiga-

[4] The invocation and upholding of the doctrine became so routine that, as is known to any lawyer having much experience with the doctrine, the government long has used virtual "canned briefs" when invoking it.

tion, in which government has denied interest to Fitzgerald, is one example of such cases.

Fitzgerald submits that the time has come when this Court should no longer permit the invocation of sovereign immunity, but should instead return to the wisdom of *United States* v. *Lee*, and extend the inroad of *Dugan* v. *Rank*, by ruling that sovereign immunity cannot bar suit against unlawful governmental action regardless of whether or not the illegal action happens to fit the category of being in excess of statutory powers or constitutionally void. The desirability of returning to *Lee* and extending *Dugan* is made manifest by the kinds of historical experiences which led to efforts to create a constitutional government under the rule of law, and which have never ceased to occur in this nation or in the world at large. Historical experience has shown, time and time again, and no less in the last fifteen years than at other times, that the preservation of liberty and democracy depends upon the existence of checks against the illegal use of governmental power. History has shown the continuing soundness, in Justice Frankfurter's words, of the views of the "long-headed statesmen" who framed the Constitution with "no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards" of illegal power. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 593 (1950) (Justice Frankfurter concurring). History has shown and continues to show the wisdom of the *Lee* case in ruling that "there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by officers of the government, professing to act in its name." 106 U.S. 219.

This Court is, of course, free to implement the wisdom of *Lee*. Precedents upholding sovereign immunity do not bar the Court from doing so. As the Court recently said in overruling the mistaken doctrine of municipal immunity from liability for damages under 42 U.S.C.

§ 1983, even when "Congress can correct our mistakes through legislation . . . we have never applied *stare decisis* mechanically to prohibit overruling an earlier decision . . . Nor is this a case where we should place on the shoulders of Congress the burden of the Court's own error' ". *Monell* v. *Department of Social Services of the City of New York*, 46 L.W. 4569, decided June 8, 1978, O.T. 1977, at p. 4579. This teaching is as applicable here as it was in *Monell*, as is shown by the many parallels between the two cases on matters which were controlling in *Monell* on the question whether prior precedent should be overruled. Those parallels on controlling matters include the following:

Here, as in *Monell*, the doctrine at issue is judge-made and therefore can properly be overruled by judges. In both cases, the doctrine was a departure from precedent (i.e., from *Lee* in the present case). In both cases, Congress refused to extend the doctrine and in fact enacted legislation to diminish it. Indeed, in the present case, Congressional inroads are broader than in *Monell*, since here the federal tort claims act waives sovereign immunity and permits recovery for a variety of actions, whereas in *Monell* Congress had merely legislated to provide for recovery of attorneys fees.

Here, as in *Monell*, the government can claim no absolute immunity and cannot arrange its affairs on the assumption that it can violate rights at will, since not only has Congress made inroads on sovereign immunity, but this Court itself has made an important departure from it in *Dugan* v. *Rank*. Here, as in *Monell*, Congressional history clearly indicates that Congress does not favor the doctrine at issue, as illustrated by Congressional inroads, and as was effectively acknowledged by the Court in *Larson* when it pointed out that Congress had increasingly allowed damage suits against the United States. And here, as was true in *Monell*, the doctrine at issue conflicts with other important lines of

precedent established by this Court, as will be shown below.

Finally, not only is this Court free to return to the wisdom of *Lee*, but principles of sound decision-making clearly indicate that it should do so. In a concurring opinion in *Monell*, Justice Powell said, quoting in part from a famous comment made by Justice Holmes, that "the law has recognized the necessity of change, lest rules 'simply persist from blind imitation of the past.' " 46 L.W. 4583 n.6. Holmes' full comment, of course, was that "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past. Holmes' The Path of The Law, 10 Harv. L. Rev. 457, 459 (1897). The doctrine of sovereign immunity continues to exist only because "so it was laid down in the time of" King Edward I, and only because of "imitation of the past." Its original grounds "have vanished long since" and it cannot be justified on any ground that will withstand analysis. To the contrary, it is condemned by the lessons of history and the fundamental precepts of our government. Thus, because the Court's decisions are open to discussion when . . . supposed to have been founded in error, and . . . its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported," *Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (per Taney, C.J.), and because " '[t]he Court bows to the lessons of experience and the force of better reasoning,' " *Edelman* v. *Jordan*, 415 U.S. 651, 671 n.14, quoting *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393, 408 (1932) (dissenting opinion of Justice Brandeis), the Court should consign sovereign immunity to the discard heap of history, where it belongs.

III. SOVEREIGN IMMUNITY IS INCONSISTENT WITH DECISIONS OF THIS COURT INVOLVING GOVERNMENTAL IMMUNITIES AND THE AWARDING OF REMEDIES, AND, IN LIGHT OF PRINCIPLES REGARDING ANCILLARY AND TRADITIONAL REMEDIES, IS PARTICULARLY INAPPLICABLE TO AWARDS OF INTEREST ON BACK PAY

A. Sovereign Immunity Conflicts with Cases Which Have Curtailed Governmental Immunities

In a series of cases decided in recent years, this Court has repeatedly struck down or greatly restricted immunities which protected governments and governmental officials from suits alleging violations of statutory and constitutional rights. *Butz* v. *Economou*, 46 L.W. 4952, decided June 29, 1978, O.T. 1977; *Hutto* v. *Finney*, 46 L.W. 4817, decided June 23, 1978, O.T. 1977; *Monell* v. *Department of Social Services*, *supra*; *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). The continued existence of sovereign immunity for the federal government is inconsistent with this line of decisions.

Three of the cases actually involved sovereign immunity: they dealt with the sovereign immunity of states. *Hutto* v. *Finney*, *supra*; *Fitzpatrick* v. *Bitzer*, *supra*, *Edelman* v. *Jordan*, *supra*. The states' sovereign immunity, unlike that of the federal government, is possessed by virtue of a specific constitutional clause, the Eleventh Amendment, rather than by virtue of mere judicial creation. But though the Court was dealing with sovereign immunity existing under an express provision of the Constitution, in all three cases it ruled that the immunity could not bar recovery. In *Edelman* v. *Jordan* the Court held that the claimed sovereign immunity did not preclude the recovery of prospective damages from state government for a violation of rights existing under a federal statute and regulations. In *Fitzpatrick* v.

Bitzer, where Congress had enforced the Fourteenth Amendment by enacting a statute granting substantive rights, providing for suit, and providing for attorneys fees, the Court held that the claimed sovereign immunity did not bar the recovery of prospective damages and attorneys fees for a violation of the rights existing under the statute. And in *Hutto* v. *Finney* the Court held that the alleged sovereign immunity could not bar the recovery of attorneys fees from state government for district court litigation in which state officials had in bad faith failed to follow court orders enforcing constitutional rights, and for appellate court litigation as to which the attorneys fees were authorized by Congress.

A fourth case, *Monell* v. *Department of Social Services*, struck down a claim of municipal immunity from damages for violations of federal statutory rights. The fifth case, *Butz* v. *Economou*, curtailed the absolute immunity of federal officials, when not acting in a judicial or prosecutorial capacity, for knowing and deliberate violations of constitutional rights.

These cases, in which governmental immunities were abolished or restricted, demonstrate that the continued existence of sovereign immunity for the federal government is in conflict with the clear trend of authority in this Court. Moreover, it is difficult to grasp why federal sovereign immunity should continue to stand when state sovereign immunity repeatedly falls. Principles applicable to the governmental immunities of states are applicable as well to the governmental immunities of the federal government, as was made explicitly clear by numerous statements of the Court in *Butz* v. *Economou*.[5]

[5] In Butz v. Economou, the Court said that decisions on state immunities are "instructive" on federal immunities, and relied heavily on such decisions in determining federal immunities. 49 L. W. at 4957. It said that it could "see no sense" in holding state officials liable, but immunizing their exact federal counterparts. 46 L. W. at 4958, 4958-59. It pointed out that any relevant problems facing state

Thus it is evident that, since state sovereign immunity has had to fall in order to insure " 'the very essence of civil liberty, [which] consists in the right of every individual to claim the protection of the laws,' " so too federal sovereign immunity must also fall. *Butz* v. *Economou, supra,* at 4954.

B. Sovereign Immunity Is In Conflict With Decisions Holding That Courts Must Fashion Appropriate Remedies In Order To Protect Rights

In addition to being incompatible with the line of authority curtailing governmental immunities, sovereign immunity conflicts with a line of decisions holding that courts must fashion remedies necessary to protect citizens' rights. These decisions establish that

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Bell* v. *Hood,* 327 US 678 at 684 (1946), quoted in *Sullivan* v. *Little Hunting Park,* 329 US 229 at 239 (1969).

The line of cases enunciating this rule include well known decisions implementing constitutional rights, *Bell* v. *Hood, supra, Bivens* v. *Six Unknown Federal Narcotics*

officials "are little if at all different from those affecting federal officials". 46 L. W. at 4958. It said that in the absence of contrary directions from Congress, it was "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 46 L. W. at 4959. And it ruled that "To create a system in which the Bill of Rights more closely monitors the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." 46 L. W. at 4959.

Agents, 403 U.S. 388 (1971), and other well known decisions implementing rights granted by statute, *Jones* v. *Mayer Co.,* 392 U.S. 409, 414 n. 13 (1968); *Sullivan* v. *Little Hunting Park, supra.* In these decisions, this Court has not shied away from allowing monetary recovery since "[h]istorically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* v. *Six Unknown Federal Narcotics Agents, supra,* 403 U.S. at 395. See also *Sullivan* v. *Little Hunting Park, supra.* And the Court has been cognizant that remedies must be provided for violations of law because "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. *Bivens, supra,* 403 U.S. at 392.

It is clear that sovereign immunity runs athwart of the foregoing line of cases, since the cases are intended to protect rights by awarding a remedy, whereas sovereign immunity denies protection of rights by denying a remedy. The existence of precisely this type of conflict was addressed by the Court in *Butz* v. *Economou,* when it pointed out that "the cause of action recognized in *Bivens* . . . would similarly be 'drained of meaning' if federal officials were entitled to absolute immunity for their constitutional transgressions," 46 L.W. at 4959, and consequently refused to uphold absolute immunity lest a lawsuit "provide no redress to the injured citizen, nor . . . in any degree deter federal officials from committing constitutional wrongs." 46 L.W. at 4959-60. As in *Butz* v. *Economou,* the Court in the present case should address the conflict between a line of authority holding that courts should fashion remedies to uphold rights, and a doctrine of immunity which nullifies rights by denying remedies. And, as it also did in *Butz* v. *Econo-*

mou, the Court should strike down the immunity in order to provide redress and deter wrongdoing.[6]

C. Because of Principles Established by this Court Regarding Ancillary and Traditional Remedies, Sovereign Immunity Is Particularly Inapplicable to Awards of Interest on Back Pay

1. *Interest On Back Pay Is An Ancillary Remedy*

Sovereign immunity is not only inconsistent with the cases discussed above, but, under principles of this Court regarding ancillary and traditional remedies, is particularly inapplicable to awards of interest on back pay. In curtailing the doctrine of state sovereign immunity in the *Edelman* and *Hutto* cases, *supra*, this Court held that sovereign immunity will not bar a particular remedy which is ancillary to another remedy whose grant is within the power of a court. *Hutto* v. *Finney*, 46 L.W. at 4820-21; *Edelman* v. *Jordan*, 415 U.S. at 667-669. Moreover, while the consequences to the governmental fisc have been of

[6] There are, of course, numerous rights whose vindication is still barred by sovereign immunity even though Congress has made inroads upon the doctrine and the Court itself made an inroad in *Dugan* v. *Rank*. See *Butz* v. *Economou*, *supra*, at 46 L. W. 4959 n. 31. Statutory rights as to which Congress has not expressly waived sovereign immunity are a major category of rights which receive no vindication against governmental invasion. Indeed this major category is exemplified by this very case, since here government has refused, on the basis of sovereign immunity, to pay Fitzgerald the interest necessary to fulfill his statutory right to be made whole. It is also possible that even some constitutional rights may be jeopardized by sovereign immunity, since the specific reach and application of *Dugan* v. *Rank* has not been sufficiently if at all delineated in litigation.

It should be noted that lawsuits against government officials themselves do not provide redress for the rights jeopardized by sovereign immunity. For even when federal officials have no personal immunity, they will lack the personal means necessary to pay damage awards. *Cf. Edelman* v. *Jordan*, 415 U.S. at 673; opinion of Justice Rehnquist, concurring in part and dissenting in part in *Butz* v. *Economou*, 46 L. W. at 4963.

concern to the Court in determining whether a remedy is permissible despite sovereign immunity, *Hutto* v. *Finney*, 46 L.W. at 4821 n. 11; *Edelman* v. *Jordan*, 415 U.S. at 665-667; the Court specifically noted in *Hutto* that permissible "'[a]ncillary costs may be very large indeed," having exceeded $6 million in one case decided by the Court. *Hutto* v. *Finney*, 46 L.W. at 4820, n.17. The Court also stressed in *Hutto* that an ancillary remedy is appropriate, despite sovereign immunity, when the government has acted in bad faith. For in such a case, the ancillary award is necessary to insure compliance with law and to compensate for bad faith non compliance.

Under these principles, the doctrine of sovereign immunity cannot bar the recovery of interest on back pay which has been wrongfully withheld.[7] The recovery of interest is merely ancillary to the award of back pay itself, whose grant is within the power of the appropriate tribunals because Congress has created a statutory right to it. The recovery of interest, moreover, will not injure the federal fisc because, in the usual case, by far the preponderant portion of the overall award will consist of the back pay expressly authorized by Congress, with the interest being only a small part of the award.[8] And even if an improbable case were to arise in which interest were to have mounted to the point where it overshadowed

[7] It may be noted that, because of the make whole policy of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e et seq.—the same policy implemented by the Back Pay Act—inteerst is granted as a matter of course on awards of back pay under Title VII. *Willett* v. *Emory and Henry College*, 427 F.Supp. 631 (1977) (W.D. Va.), aff'd 529 F.2d 212 (C.A. 4, 1978); *Davis* v. *Jobs For Progress, Inc.*, 427 F.Supp. 479 (1976); *Tidwell* v. *American Oil Co.*, 332 F.Supp. 424 (1971); see *Pettway* v. *American Cast Iron Pipe Co.*, 491 F.2d 211 (1974) (C.A. 5); *NLRB* v. *American Express Warehouse*, 374 F.2d 573 (1967) (C.A. 5).

[8] This is true in the present case even though the government withheld back pay from Fitzgerald for many years.

the amount of back pay itself, this would likely be due to a very lengthy course of bad faith conduct by which officials long refused to pay an employee the monies due him.[9]

2. *Interest Is A Traditional Remedy*

In *Hutto* v. *Finney* this Court, speaking of an award of costs of suit, pointed out that state sovereign immunity granted by the Eleventh Amendment does not bar a form of recovery which has "traditionally been awarded." 46 L.W. at 4821. Like costs of suit, interest is a form of recovery which has "traditionally been awarded." It was indeed called "so natural and common a remedy" by the Court of Appeals. The government itself demands interest on monies owed to it, and can hardly complain if it must in turn pay interest on money which it owes to citizens,[10] especially citizens who have been denied a living by the wrongful withholding of their pay. If the government can refuse with impunity to pay interest to citizens whose pay has been wrongly withheld, then in practical effect it has received an interest free loan from these citizens by illegally denying them the monies necessary to support themselves and their

[9] During the course of this bad faith conduct, moreover, as well as where there was no bad faith, the government would have had the use of the money at statutory rates of interest which are normally much less than the rate of interest the government would have had to pay in the open market.

[10] In a famous comment quoted by the Court of Appeals in this case, this Court, per Justice Holmes, said that citizens "must turn square corners when they deal with the Government." Rock Island, Arkansas & Louisiana RR v. United States, 254 U.S. 141, 143 (1920). Since in this nation the government was instituted and exists for the benefit of the citizens, instead of the other way 'round, it is hard to understand why the government should not equally have to turn square corners when dealing with citizens. If citizens must pay interest to government on monies they owe to it, but government need not pay interest to citizens on money it owes to them, then it is obvious the government is not turning square corners when dealing with the citizens.

families. For the government, as a practical matter, to secure an interest free loan in this way is wholly reprehensible if not worse, and it can hardly be thought that Congress intended to authorize such conduct when it passed the Back Pay Act. Rather, the more logical (not to say moral) reading of the act is that it represents a Congressional waiver of any sovereign immunity which might otherwise bar the payment of interest.[11]

III. THIS CASE ILLUSTRATES NUMEROUS OF THE REASONS WHY SOVEREIGN IMMUNITY SHOULD BE OVERRULED OR AT LEAST SHOULD BE RULED INAPPLICABLE TO RECOVERY OF INTEREST ON BACK PAY

The foregoing discussion makes clear that there are numerous reasons why this Court should grant this petition for certiorari and either overrule the doctrine of sovereign immunity in its entirety or at least rule it inapplicable to the recovery of interest on back pay. The appropriateness of granting this petition is further enhanced because the facts of this case provide a paradigm illustration of so many of the reasons for ruling that sovereign immunity can no longer bar recoveries or at least cannot bar recovery of interest on awards of back pay.

First, this case presents an unfortunately classic example of governmental efforts to lawlessly destroy the rights of a citizen. Fitzgerald, an outstanding employee who was performing exemplary public service, was subjected to governmental ostracism and was fired for reasons which were illegal. After he was unlawfully fired,

[11] This reading of Congress' intent is also supported by the fact that Congress' ability to carry out its constitutional functions will be hampered if the government can visit illegal retribution upon employees who lawfully give Congress information it needs to carry out its functions, and can then invoke sovereign immunity to bar recoveries by these employees.

a government agency sought to suppress information about his case by holding closed hearings in violation of due process. After judicially ordered open hearings were held and a decision was rendered, the government refused to follow a lawful order to reinstate Fitzgerald to an appropriate position, and also refused for a long period to pay him money which was owed to him, even money which *concededly* was owed to him. The government also refused to pay him attorneys fees or interest, and has forced him to fight a legal battle which is already over eight years old in order to obtain justice. The government has been rebuked on several occasions by federal district courts and federal courts of appeal, but this has not dissuaded it from its course of resistance to law—a course of action during which it has invoked sovereign immunity to bar various forms of recovery.

Second, the claim of immunity being made here not only conflicts with the teaching of recent cases on governmental immunities, but is being used to deny a remedy necessary to enforce the Congressionally granted right of an unlawfully fired employee to be made whole for his losses.

Third, the remedy of interest being sought here is ancillary to the main remedy of back pay, is a traditional remedy, is a remedy obtained by the government itself, and will work no harm to the fisc. Indeed, it will aid the fisc because it will be a step towards insuring that government employees will be able to lawfully inform Congress of enormous wastes of money [12] without fearing devastating retaliation that will jeopardize their livelihood.

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[12] Fitzgerald warned Congress of a $2 billion cost overrun. Since it is often pointed out that the work of the federal judiciary would be greatly facilitated if the courts were allotted an extra amount of money equal to the cost of a single destroyer, the mind staggers at the beneficial results which could arise if the government were to save $2 billion by avoiding an unnecessary cost overrun.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

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